Supreme Court, U.S.
FILED
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No. 09-081522

IN THE
Supreme Court of the United States

ROBINA JENKINS

Petitioner,

v.

NANCY WORLEY, Individually and in her capacity as Secretary of State of Alabama; JOE DICKSON, HENRY MCMILLAN, JOHN MCMILLAN, HORACE W. POWELL, SR., and JOYCE P. O'NEAL, individually and in their capacity as members of the State of Alabama Personnel Board

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the allegations in Robina Jenkins' Complaint that Nancy Worley and the State of Alabama Personnel Board violated rights afforded Jenkins under the State Merit System Act and the Fourteenth Amendment to the United States Constitution give rise to removal jurisdiction under 28 U.S.C. 1441(a) as claims "arising under" the Constitution and laws of the United States?

Table of Contents

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv, v

CITATIONS OF OPINIONS AND ORDERS.....1

BASIS FOR JURISDICTION IN THIS COURT.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED.....2

STATEMENT OF THE CASE..... 9

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE 13

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 13

CONCLUSION 19

APPENDIX ...

The unpublished opinion of the USCA 11th Circuit, affirming Respondent's Motion for Summary Judgment.....2

Table of Contents–Continued

Page

The Memorandum Opinion and Order of the District Court, Middle District of Alabama, granting Respondent's Motion for Summary Judgment 5

The Per Curiam Opinion denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc.....21

Petitioner's Petition for Review filed with the State Personnel Board for the State of Alabama 23

Petitioner's Complaint filed in the Circuit Court of Montgomery County, Alabama..... 28

Table of Authorities

Page

Cases

Christianson v. Colt Industries,
486 U.S. 800.....18

Franchise Bd. V. Cont. Laborers Vac. Trust,
103 S. Ct. 2840 (1983).....15

In Re Business Men Assurance Company of America,
992 F. 21 181 (8th Cir. 1993).....14

Mulcahey v. Columbia Organic Chemical Co., Inc.,
29 F. 3d., 148 (4th Cir.1994).....14

Rains v. Criterion Systems, *Inc.*,
80 F. 3d 339 (9th Cir. 1996).....16

Willy v. Coastal Corp.,
855 F. 2d 1060 (5th Cir. 1988).....14, 15

Wilson v. Republic Iron and Steele,
257 U.S. 92. 42. S. Ct. 66.....14, 19

Statutes

28 U.S.C. §1254(1).....2

28 U.S.C. §1331.....12, 13, 14, 19

28 U.S.C. § 1367 12

28 U.S.C. §1441(a).....i, 11, 13, 16, 19

28 U.S.C. 1446.....11

42 U.S.C. 2000e-2 [Title VII].....16, 17

Fourteenth Amendment United States Constitution.....i, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19

Other Authorities

36-26-1, Code of Alabama, 1975 (The Merit System Act)....i, 2, 9, 10, 11, 15, 16, 17, 18

36-26-3, Code of Alabama, 1975.....2

36-26-6, Code of Alabama, 1975.....3

36-26-26, Code of Alabama, 1975.....3

41-22-3, Code of Alabama, 1975 (Alabama Administrative Procedure Act).....4

41-22-20, Code of Alabama, 1975.....5

670-x-3-.01 (Rules of the State Personnel Board, State of Alabama).....6

670-x-18.01 (Layoffs).....7

Citation of Opinions and Orders

The following relevant opinions and orders are reprinted in the Appendix.

(i) The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, affirming Respondents' Motion for Summary Judgment.....2

(ii) The Memorandum Opinion and Order of the District Court for the Middle District of Alabama granting Respondents' Motion for Summary Judgment.....6

(iii) The Per Curiam Opinion denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc.....31

Basis for Jurisdiction in this Court

On January 6, 2009, the 11th Circuit Court of Appeals entered a judgment affirming the Summary Judgment entered by United States District Court for the Middle District of Alabama; and on March 11, 2009, entered a Per Curiam Opinion denying Robina Jenkins' (Jenkins) Petition for Rehearing and Petition for Rehearing En Banc.

The jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

Constitutional, Statutory Provisions and Regulations Implicated by This Petition

This case is grounded in the following state law, no part of which is contra to any federal constitutional provision or federal statute, rule or regulation.

36-26-1, Code of Alabama, 1975

This article shall be cited and may be known as the Merit System Act.

36-26-3, Code of Alabama, 1975. Purposes of Article

The purposes of the article [the Merit System Act] are to assure to all citizens of demonstrated capacity, ability and training an equal opportunity to compete for service with the State of Alabama, to establish conditions in the state service which will attract officers and employees of character and capacity and to increase the efficiency of the governmental

departments and agencies by the improvement of methods of personnel administration.

36-26-6, Code of Alabama, 1975. Powers and Duties.

> B) It shall be the duty of the Board [State Personnel Board] as a body:
>
> > 3) To make investigations either on petition of a citizen, taxpayer or interested party or of its own motion, concerning the enforcement and effect of this article and to require observance of its provisions and the rules and regulations made pursuant thereto;

36-26-26, Code of Alabama, 1975. Layoffs.

> a) In accordance with the rules, an appointing authority may lay off an employee in the classified service whenever he deems it necessary, by reason of shortage of work or funds or the abolition of a position or other material change in duties or organization. The seniority and service rating of employees shall be considered, in such manner as the rules shall provide, among other factors, in determining the order of layoffs. The appointing authority shall give written notice to the [personnel] director of every proposed layoff a reasonable time

before the effective date thereof, and the director shall make such orders relating thereto as he considers necessary to secure compliance with the rules. The name of every regular employee so laid off shall be placed in the appropriate reemployment list.

b) In addition to any rights currently provided to state employees, any permanent state employee who is laid off from a position under the state merit system shall have priority for any other position in the same class filled from an open competitive register by any appointing authority in accordance with rules adopted by the state personnel board.

41-22-3, Code of Alabama, 1975. Definitions.

1) Agency. Every board, bureau, commission, department, officer or other administrative office or unit of the state...

3) Contested Case. A proceeding, including but nor restricted to rate making, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.

41-22-20, Code of Alabama, 1975. Judicial review of preliminary, procedural, etc., actions or rulings and final decisions in contested cases.

a) A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

b) All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review; unless waived by the agency or the court on a showing of substantial hardship. A petition shall be filed either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit

court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party other than an intervenor resides or if a party, other than an intervenor, is a corporation, domestic or foreign, having a registered office or business office in this state, then in the county of the registered office or principal place of business within this state.

670-x-3-.01. Rules of the State Personnel Board, State of Alabama. Definitions.

f) Employees.

l) The 'Classified Service' consists of all positions in the service not specifically exempt or placed in the unclassified service by the Act.

5) 'Permanent Employee' means an employee who has satisfactorily completed a working test period of at least six months and whose permanent appointment has been recommended by the appointing authority.

6) Permanent Position' means any position in the classified service which has required or is likely to require the services of an employee without interruption for a period of more than 104 work days (Statutory Authority: 36-36-2, 36-36-9 and 36-36-10, Code of Alabama, 1975).

670-x-18-. 01 Layoffs.

An appointing authority may lay off an employee when it is deemed necessary by reason of shortage of work or funds, or the abolition of a position or other material change in duties or organization. The order in which an employee is to be laid off in the classified services should be determined by the appointing authority in accordance with these rules...

Employees laid off in good standing will be placed on the reemployment register for two years. Further, during this time period the department involved may not hire persons in the class from any register, or provisionally, as long as one available employee laid off by the department is on the reemployment register for the class, provided, however, that a person who refuses offers of reemployment shall forfeit such rights to subsequent placements as provided under Rule 670-x-9-.02,

Subsection 5; Removal of Names from the Register...

In addition to any rights currently provided to state employees, any permanent state employees shall have priority for any other position in the same class filled from an open competitive register by any appointing authority in accordance with rules adopted by the State Personnel Board.

Statement of Case

On or about October 14, 2005, Jenkins filed a complaint (App.39) in the Circuit Court of Montgomery County, Alabama against Nancy Worley Secretary of State and the Alabama State Personnel Board (Board) alleging, inter alia, that Jenkins was a "classified employee" under 36-26-1, et seq., Code of Alabama, 1975, the Merit System Act; that on or about October 16, 2003, Worley notified Jenkins that due to budget cuts, Jenkins' employment with the Secretary of State would end effective October 31, 2003; that, pursuant to, and in accordance with the provisions of the Merit System Act, Worley is required to consider Jenkins' seniority and service rating in determining whether to lay off Jenkins; that Worley failed and refused to consider Jenkins' seniority and service rating and retained employees with less seniority and service rating than plaintiff, in violation of the Merit System Act and rules adopted by the State Personnel Board; that the failure and refusal of Worley to consider Jenkins' seniority and service rating and the rules adopted by the Board in laying off Jenkins deprived Jenkins of her protected interest in the position of Department Program Manager, in violation of the Merit System Act and in violation of the Fourteenth Amendment to the United States Constitution.

In Count II of the Complaint, Jenkins alleges, inter alia, that when Worley notified Jenkins on October 16, 2003, that her employment with the Secretary of State would end effective October 31, 2003, she further notified Jenkins that in accordance with the requirement of the Merit System Act, Jenkins would be placed on the layoff re-employment

register for two years for the classification in which she was laid off; and that during that period of time the appointing authority of the agency would not hire anyone in the classification from the register or provisionally as long as Jenkins was available for re-employment; that, subsequent to Jenkins' layoff, Worley appointed an individual as Acting Director, Corporate Division, which was the classification Jenkins held prior to her layoff; that Jenkins was available for re-employment at the time Worley appointed the individual to the position; that Worley's failure and refusal to offer re-employment to Jenkins in the classification Jenkins held prior to her layoff deprived Jenkins of her protected property interest in the position and violated rights guaranteed Jenkins under 32-26-1, et seq., Code of Alabama, 1975, and the Fourteenth Amendment to the United States Constitution.

In Count III of the complaint, Jenkins alleges that, subsequent to her layoff Worley hired an individual to the position Jenkins held prior to her layoff, even though the person was not on the State Employment Register for said position; that the action of Worley in hiring an individual in the position who was not on the State Employment Register violated the Merit System Act and deprived plaintiff of her protected property interest in her position; that the action of Worley in hiring an individual in the position who was not on the State Employment Register for the position deprived plaintiff of her protected property interest in the position, in violation of the Fourteenth Amendment to the United States Constitution.

In Count IV of the complaint, Jenkins alleges that the defendant Board has the duty under the Merit System Act to require Worley to abide by the

provisions of said Act, and the rules and regulations made by the Board pursuant to said Act; that the Board breached its duty to require Worley to abide by the provisions of the Merit System Act, thereby depriving Jenkins of her protected interest in her position; that , as a further consequence and result of the Board's breach of its duty, Jenkins was deprived of her protected property interest in her position, in violation of the Merit System Act and the Fourteenth Amendment to the United States Constitution.

On or about October 31, 2005, Worley and the Board filed a Notice of Removal with the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. 1441 and 1446, asserting, inter alia, the district court has original subject matter jurisdiction over Jenkins' Complaint on the grounds that same alleges violations and seeks relief pursuant to the Fourteenth Amendment to the United States Constitution.

On or about November 14, 2005, Jenkins filed a Motion to Remand and Memorandum of Law in Support Thereof with the district court, asserting as grounds therefor, that Jenkins' claims against defendants do not arise under federal law and therefore are not removable on federal question grounds.

On or about May 11, 2006, the district court entered an Order denying Jenkins' Motion to Remand.

On or about December 14, 2007, Worley and the Board filed Motion for Summary Judgment with the district court asserting, inter alia, that they are entitled to qualified immunity for all claims against them in their individual capacity; that they have absolute immunity from damages in their official capacity.

On or about March 7, 2008, Jenkins filed with the district court a Memorandum in Opposition to the Motion for Summary Judgment of Worley and the Board.

On or about April 8, 2008, the district court entered its Memorandum Opinion and Order and found, inter alia, "the court has jurisdiction of the plaintiff's federal claims pursuant to federal subject matter jurisdiction, 28 U.S.C., 1331. The court has supplemental jurisdiction over the plaintiff's state law claims under 28 U.S.C., 1367.

The district court granted the Motion for Summary Judgment of Worley and the Board, and entered a Final Judgment, in favor of same and dismissed the case with prejudice.

On or about May 5, 2008, Jenkins filed with the district court a Notice of Appeal to the USCA 11th Circuit from the Memorandum Opinion and Order and Final Judgment entered by the district court.

On or about January 6, 2008, the USCA 11th Circuit entered a per curiam opinion finding, inter alia, "the federal court has jurisdiction. Each and every count of Jenkins' complaint alleges a violation of the Fourteenth Amendment of the United States Constitution. *Jenkins' argument that these claims are peripheral to her State claims is insufficient to deprive the federal court of subject matter jurisdiction. Removal was proper." (Emphasis added)*

On or about January 26, 2008, Jenkins filed Petition for Hearing En Banc with the 11th Circuit Court of Appeals and on March 11, 2009, the Court of Appeals entered a per curiam opinion denying Jenkins' Petition for Rehearing and Petition for Rehearing En Banc,.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court did not have federal question jurisdiction.

Argument Supporting Allowance of the Writ

The right to remove a case from state to federal court derives solely from 28 USC § 1441, which provides in relevant part:

> (a) Except as otherwise expressly provided by act of congress, any civil action brought in state court of which the district courts have original jurisdiction, may be removed by the defendant or the defendants, to the district Court of the United States for the District and division embracing the place where such action is pending

Because of the requirement of original jurisdiction, the propriety of removal thus falls within the provisions of 28 U.S.C. § 1331:

The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Removal Jurisdiction Standards

As a threshold matter, the Court of Appeals, in determining that the district court had jurisdiction utilized an incorrect standard. There the

court found ... "the federal court had jurisdiction. Each and every count of Jenkins' complaint alleges a violation of the Fourteenth Amendment of the United States Constitution. *Jenkins' argument that these claims are peripheral to her State claim is insufficient to deprive the federal court of subject matter jurisdiction. Removal was proper." (Emphasis added)*

While there are, of course, areas of disagreement among the circuits on issues involving removal jurisdiction, most circuits generally agree that the parties seeking removal and opposing remand have the burden of establishing federal subject matter jurisdiction. See In Re Business Men Assurance Company of America, 992 F. 2d. 181(8th Circuit 1993) Willy v. the Coastal Corporation, 855 F. 2d 1160. See also Mulcahey v. Columbia Organic Chemicals Co., Inc., *29 F. 3d. 148* (4th Circuit 1994)

Mulcahey's complaint alleges four South Carolina tort law claims of negligence, abnormally dangerous activities, private nuisance and injunction. He later amended Count 1 to allege a negligence per se claim based on violation of various federal, state and local laws.

Citing Wilson v. Republic Iron and Steele, 257 U.S. 92. 42. S. Ct. 66, the Mulcahey court stated with clarity the applicable standards for determining whether a claim is removable:

> In determining whether the action presents a federal question under U.S.C.A. Section 1331, a court must first discern whether federal or state law creates the cause of action. If... state law creates the cause of action, federal question jurisdiction depends on whether plaintiffs demand necessarily depends on

resolution of a substantial question of federal law.

See also Franchise Bd. v. Cont Laborers Vac. Trust, 103 S. Ct. 2840 (1983).

Where alternative state and federal claims are pled and recovery could be had under either theory, the federal claims are not supplemental to the state claim and are insufficient to support subject matter jurisdiction.

The allegations in Jenkins' complaint sound in state law the [Merit System Act.] Jenkins can recover on her state claims and such recovery is not dependent on resolution of the Fourteenth Amendment claims. The pleading of alternative state and federal theories where recovery could be had on either theory renders the federal claims insubstantial to confer federal subject matter jurisdiction. Where alternative state and federal theories are pled and recovery can be had under either theory, the existence of the federal claim is not sufficient to trigger removal jurisdiction.

In Willy v. Coastal Corp., 855 F. 2d. 1060, the Fifth Circuit Court of Appeals held that claims supported by state as well as federal theories may not form the basis of federal question jurisdiction unless the federal claims are essential to the state as well as the federal theories. *Willy* asserted state claims for wrongful discharge, breach of the code of ethics of the American and Texas Bar Associations, invasion of privacy, defamation, blacklisting, and interference with contractual business relationships. Willy further alleged that he sought to cause his employer to comply with, and that he refused to engage in, activity that assertedly would violate state and federal environmental and securities laws,

specifically naming the Clean Water Act (33 U.S.C. 251, et seq.), the Resource Conservation and Recovery Act (42 U.S.C. 6701, et esq.), the Clean Air Act (42 U.S.C. 7401, et seq.), the Safe Drinking Water Act (42 U.S.C. 300f, et seq.) and the Solid Waste Disposal Act (42 U.S.C. 6901, et seq.) The court found that there was nothing in Willy's state pleading to indicate that the federal claims are necessary to the state claims or that the state claims are not sufficient without the federal claims. The federal claims are not ones in the forefront of the case but are more collateral in nature, and are not substantial in relation to the claim as a whole, which is in essence one under the state law.

Jenkins' Merit System Act claims are not essential to the Fourteenth Amendment claims. Jenkins claims sound in state law. State claims supported by alternative federal theories may not form the basis for federal question jurisdiction.

In Rains v. Criterion Systems, Inc., 80 F. 3d. 339, the Ninth Circuit Court of Appeals held that a plaintiff may allege a violation of Title VII of the Civil Rights Act of 1964's policy against religious discrimination as part of a state law cause of action without converting his claim into a Title VII action or an action that depends on a substantial federal question. Id 343. The court found that Rains' complaint states at the outset, 1) that it arises under "the laws of the United States (42 U.S.C. 2000e-2) [Title VII], the laws of the State of California (Gov. Code, Sec. 12940 et seq.) the rules, regulations and directives implementing said statutes and common law. Rains labels the relevant causes of action as a Wrongful Termination against Public Policy and an Intentional Interference with Contractual Relations. The court found, inter alia, that federal question

jurisdiction could exist where one or more of Rains' state law claims necessarily turned on the construction of a substantial, disputed federal question. Id 344. The court further found that:

> The invocation of Title VII as a basis for establishing an element of a state law cause of action does not confer federal question jurisdiction when the plaintiff also invokes a state constitutional provision or a state statute that can and does serve the same purpose... Here Title VII is not a 'necessary element' of the state law claim because state law independently espouses the same public policy established by Title VII. When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim. Id. 347.

Jenkins' complaint sounds in state law. The Fourteenth Amendment is not a necessary element of the Merit System claims. The Merit System Act independently espouses the same public policy established by the Fourteenth Amendment. The Fourteenth Amendment claims are not elements of the state law claims and are therefore insufficient to support federal question jurisdiction.

> **The decision of the United States District Court for the 11th Circuit finding that Jenkins' Fourteenth Amendment claims are not peripheral to her state claims and therefore the basis for federal subject**

matter jurisdiction is in conflict with the decision of the Supreme Court.

In Christianson v. Colt Industries, 486 U.S. 800, the court held:

> If on the face of a well-pleaded complaint there are...reasons completely unrelated to the provisions and purposes of the [patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks, then the claim does not 'arise under' those laws. Thus a claim supported by alternative theories in the complaint may not form the basis for 1338(a) jurisdiction unless patent law is essential to each of those theories...federal question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law; and that federal law is a necessary element of one of the well-pleaded claims.

The allegations in Jenkins' complaint are grounded only in the Merit System Act. Jenkins can be afforded relief without any resolution of her Fourteenth Amendment claims that are alternative theories which may not form the basis of federal question jurisdiction.

Where jurisdiction rests on Jenkins' state law claims and the federal claims are alternative claims, the federal claims do not form the basis of federal question jurisdiction under 28 U.S.C. 1331. Under the well-pleaded complaint rule, "whether a claim

arises under federal law is determined from what necessarily appears in the petitioner's statement of her own claim in the complaint. Id. At 809. The Fourteenth Amendment claims are creatures of state law. Jenkins' right to relief does not depend on a resolution of a substantial federal law and therefore the federal claims are not a basis for federal subject matter jurisdiction.

CONCLUSION

Petitioner respectfully submits that a Writ of Certiorari should issue to the United States Court of Appeals for the Eleventh Circuit to review its decision that petitioner's Fourteenth Amendment claims are not peripheral to her state claims and therefore the basis for federal subject matter jurisdiction. The writ should issue to determine whether the assertion of state claims as well as alternative federal claims which are not essential to the state claims conferred removal jurisdiction pursuant to 28 U.S.C.1441 (a).

Respectfully submitted,

_____

Solomon S. Seay, Jr.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12603
Non-Argument Calendar

D.C. Docket No. 05-01049-CV-T-N

ROBINA JENKINS,

Plaintiff-Appellant,

Versus

NANCY L. WORLEY, individually and in her capacity as Secretary of State, State of Alabama, JOE DICKSON, HARRY MCMILLAN, HORACE W. POWELL, SR., JOYCE P. O'NEAL, individually and in their capacity as Members of the State Personnel Board, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(January 6, 2009)

Before BIRCH, HULL and COX, Circuit Judges.

PER CURIAM:

Plaintiff Robina Jenkins was employed by the Alabama Secretary of State's office as a Department Program Manager. During a state-wide budget crisis in 2003, she was laid off. Nancy L. Worley was the appointing authority within the Secretary of State's office, and the person who informed Jenkins that she was laid off. In July 2005, Jenkins petitioned the State Personnel Board ("the Board") for a hearing regarding the propriety of the lay-off and whether Worley had impermissibly hired another employee to fill Jenkins' position after Jenkins was laid off. The Board responded both that Jenkins' petition was untimely and that the Board had conducted a review of its records and could find no factual support for Jenkins' claims.

In October, 2005, Jenkins filed a lawsuit in the Montgomery County Circuit Court, alleging that Worley and the other Defendants, all members of the board, had violated Alabama's Merit System Act and deprived Jenkins of her property interest in her job, in violation of the Fourteenth Amendment of the United States Constitution. The defendants removed the case to federal court. (R.1-1.) The magistrate judge denied Jenkins' motion for remand to state court and later granted Defendants' motion for summary judgment on all of Jenkins' claims.[1]

Jenkins appeals, arguing that the federal court lacked subject matter jurisdiction and that genuine issues of material fact made summary judgment inappropriate.

First, we consider the jurisdictional issue. After review of the pleadings, we conclude that the federal court had jurisdiction. Pursuant to 28 U.S.C. Sec. 1441(b), an action that "aris[es] under

[1] Pursuant to 28 U.S.C. Sec. 636(c) (1), the parties consented to entry of final judgment by the magistrate judge.

the Constitution, treaties or laws of the United States" is generally removable. Each and every count of Jenkins' complaint alleges a violation of the Fourteenth Amendment of the United States Constitution. Jenkins' argument that these claims are peripheral to her state claims is insufficient to deprive the federal courts of subject matter jurisdiction. Removal was proper.

On the merits, we find that summary judgment for the Defendants also was proper for the reasons stated in the magistrate judge's Memorandum Opinion and Order (R.3-50 at 11-13.) For the foregoing reasons, summary judgment for the Defendants is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROBINA JENKINS

Plaintiff,

v.

CIVIL ACTION
NO 2:05cv1049-
CSC (WO)

NANCY WORLEY, individually and in her official capacity as Secretary of State, State of Alabama; JOE DICKSON, individually and in his official capacity as a member of the State Personnel Board; HENRY MCMILLAN, individually and in his official capacity as a member of the State Personnel Board; JOHN MCMILLAN, individually and in his official capacity as a member of the State Personnel Board; HORACE W. POWELL, individually and In his official capacity as a member of the State Personnel Board; and JOYCE P. O'NEAL, individually and in her official capacity as a member of the State Personnel Board.

Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The plaintiff, Robina Jenkins ("Jenkins") filed thislawsuit against the defendants in the Montgomery County Circuit Court, alleging violations of the Merit System Act, Ala. CODE Sec.36-26-1, *et seq.*, and the Fourteenth Amendment, based on the termination of her employment with the Alabama Secretary of State's office. Jenkins names former Secretary of State Nancy Worley ("Worley") and State Personnel board members Joe Dickson, Henry McMillan, John McMillan, Horace W. Powell, sr., and Joyce P. O'Neal as defendants. Specifically, Jenkins asserts the following claims:

> (1) Worley violated the merit System Act and the Fourteenth Amendment when she failed to consider Jenkins' seniority and service ratings, as well as the rules adopted by the State Personnel Board, prior to terminating Jenkins from her position as Department Program Manager.
>
> (2) Worley violated the Merit System Act and the Fourteenth Amendment by failing to offer Jenkins re-employment and by appointing another employee into her prior position.
>
> (3) Worley violated the Merit System Act and the Fourteenth Amendment by hiring an individual into Jenkins' classification without the individual

being on the State Employment Register.

(4) Members of the State Personnel Board failed to investigate Jenkins' allegations and did not require Worley to abide by the Rules of the State Personnel Board in violation of the Merit System Act and the Fourteenth Amendment.

(Doc. No. 1-2)

The defendants removed the case to this court pursuant to 28 U.S.C. Sections 1441 and 1446[2]. The court has jurisdiction of the plaintiff's federal claims pursuant to federal subject matter jurisdiction, 28 U.S.C. Section 1331. The court has supplemental jurisdiction over the Plaintiff's state law claims under 28 U.S.C. 1367. Pursuant to 28 U.S.C. Sec. 636 (c) (1) and M.D. Ala. LR 73 1, the parties have

[2] In November 2005, Jenkins filed a motion to remand the case to state court, pursuant to 28 U.S.C. sec. 1447 (c). During oral argument on the motion, Jenkins argued that the complaint does not state a federal cause of action. (Doc. No. 10) The Court, however, concluded that the plain language of Jenkins' claim that the defendants deprived her of a protected property interest in violation of the Fourteenth Amendment stated a federal claim and denied the motion. (Doc. No. 15) Notwithstanding that conclusion and because of the plaintiff's apparent discomfort with continuing with the federal claim, during a status conference on January 3, 2008, the court questioned whether the plaintiff did desire to pursue a constitutional claim in this case. Plaintiff's counsel changed his position, strategically arguing that Jenkins' complaint includes a claim that Jenkins did not receive notice and was not afforded a hearing in violation of the Due Process Clause. (Doc. No. 42)

consented to entry of final judgment by the United States Magistrate Judge.

Now pending before the court is the defendant's motion for summary judgment (Doc. No. 36) The plaintiff filed a response in opposition to the motion for summary judgment to which the defendants have replied. After careful review of the defendants' motion for summary judgment, the briefs filed in support of and in opposition to the motion, and the supporting and opposing evidentiary materials, the court concludes that the defendants' motion for summary judgment is due to be granted.

II. THE SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56 (c) summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)[3] The party moving for summary

[3] In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the court stated: [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue...Rule 56(e)...requires the nonmoving party to go beyond the pleadings and by...affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate 'specific facts showing that there is a genuine issue for trial...We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment...Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c) except the mere pleadings themselves...

judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believe demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The movant may meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-324 If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to establish, with evidence beyond the pleadings, that a genuine issue material to the non-movant's case exists. See *Fitzpatrick v. City of Atlanta*, 2 F. 3d. 1112, 1115-17 (11th Cir. 1993); see also *Fed. R. Civ. P. 56(e).* ("When a motion for summary judgment is made and supported...an adverse party may not rest upon the mere allegations or denials of [his] pleading, but [his] response...must set forth specific facts showing that there is a genuine issue for trial.") What is material is determined by the substantive law applicable to the case. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). A dispute of material fact "is 'genuine'...if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matasushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-movant must present "affirmative evidence" of material factual conflicts to defeat a properly supported motion for summary judgment.

Anderson, 477 U.S. at 257. If the non-movant's response consists of nothing more than conclusory allegations, the court must enter summary judgment for the movant. See *Holyfield v. Reno*, 115 F. Ed 1555, 1564 n. 6 911th Cir. 1997); *Harris v. Ostrout*, 65 F. 3d. 912 (11th Cir. 1995). However, if there is a conflict in the evidence, "the [plaintiff's] evidence is to be believed and all reasonable inferences must be drawn in this favor." *Anderson*, 477 U.S. at 255; *Molina v. Merritt & Furman Ins. Agency*, 207 F. 3d. 1351, 1356 (11th Cir. 2000). After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law Fed. R. Civ. P. 56 (c). With these principles of law in mind, the court will determine now whether summary judgment is appropriate and should be granted.

III. FACTS[4]

Between 1997 and 2003, Jenkins was employed in the Secretary of State's office as a Departmental Program Manager, with the working title of Corporations Director. (Pl's Dep. P. 12) Jenkins was a conscientious employee who received high evaluations and had a good working relationship with her supervisors. (*Id.*, pp. 27-29, Doc. No. 37-4, pp. 18-19) Unfortunately, during a state-wide budget crisis in 2003, Jenkins was laid off from her job.

[4] On a motion for summary judgment the court must construe the facts in the light most favorable to the non-movant who, in this case, is the plaintiff. *See, e.g. Brown v. Crawford*, 906 F. 2d. 667 (11th Cir. 1990).

Jenkins was one of many employees affected by the State's financial crisis. In 2003, hundreds of employees throughout state government were affected by layoffs, retirement, voluntary demotions, and transfers as the result of budget cuts. (Defs' Ex. 3, Jackie Graham's Affid., p.1) The Governor initially recommended that the Office of the Secretary of State's budget be cut by 18.85%. After the Office of Voter Registration was legislatively moved into the Office of the Secretary of State, the budget, which passed in September 2003, represented a 12% cut. (Defs' Ex. 5, Carolyn Middleton's Affid., pp. 1-2) However, due to the appropriation of money under the Help America Vote Act, the actual effect on the budget was an 18% cut. (*Id.*, p.2)

Worley met with the Finance Director and determined that cuts of certain laborers and the abolishment of one position per program category were necessary. (Defs' Ex.2, Worley's Interrog., p.5) On October 9, 2003, Worley submitted a layoff plan to the State Personnel Department. (Graham's Affid., p.4, Attach. A) With the exception of the proposed layoff of the Director of Voter Registration, a statutorily required position, the plan was accepted as technically correct and in compliance with the Rules of the State Personnel Board. (*Id.*)

During the layoff process, an efficiency rating based on an employee's performance appraisal scores and seniority is used to rank employees. (*Id.*, p.2) The score is computed by multiplying the sum of the points for performance by fifty (50) percent and the sum of points for seniority by fifty (50) percent and combining the sum of both factors. (*id.*) These ratings are based upon the total length of continuous service and the performance appraisal scores earned

in the class in the department affected by the layoff. (*Id.*)

In Worley's plan, the abolishment of one Department Program Manager position and other personnel cuts were recommended. (*Id.*, p.4) The classification and the number of positions subject to the layoff process are within the discretion of the appointing authority for that department. (*Id.*) Worley is the appointing authority for the Secretary of State's office. (*Id.*)

Both Jenkins and Sharon Frith ("Frith") held the classification of Departmental Program Manager in the Office of the Secretary of State. Both employees received high efficiency ratings. Frith received an efficiency rating of 95.00, while Jenkins received an efficiency rating of 93.07. (*Id.* pp. 4-5) Consequently, Jenkins' position was selected to be abolished in accordance with the layoff plan. (*Id.*, p. 5)

On October 16, 2003, Worley provided a letter to Jenkins advising that, due to budget cuts, her employment would end on October 31, 2003. (Defs' Ex. 4, p. 1) The letter also informed Jenkins of the benefits applicable to laid-off employees and advised as follows:

> You will be placed on the layoff reemployment register for the classification in which you were laid off for two years. During this time, the appointment authority of this agency cannot hire someone in this class from the register or provisionally as long as you are available for reemployment. Also, no other state agency can hire any employees from an open-competitive register in your class as long as you are available for the position. It is

> important to note that your refusal of an offer shall forfeit your rights regarding layoff reemployment.

(*Id.*, pp. 1-2)

Jenkins remained on the layoff re-employment register for two years; however, the register for Jenkins' classification was not requested by any appointing authority nor was anyone provisionally appointed to the Departmental Program Manager classification during the two-years period. (Def's Ex. 3, Graham's Affid., p. 6) After Jenkins was terminated, Worley asked Sharon Viox ("Viox"), an employee classified as an Administrative Support Assistant III, to serve in an acting capacity as the Director of the Corporate Division. (*Id.*) Although Viox was given the working title of Director of Corporate Division, assigned additional tasks, and provided business cards with her new title, she remained in the classification of Administrative Support Assistant III and did not receive any merit raises between 2003 and 2006. (*Id.*, pp. 6-7; Viox's Dep., p. 25)

On July 18, 2005, Jenkins' counsel submitted a petition for review to the State Personnel Board, in which he requested a fact-finding proceeding and a hearing concerning whether the Secretary of State or other state agencies hired an individual into Jenkins' classification without first offering her the position in violation of the Merit System Act and the Constitution of Alabama. (Pl's Ex. 3) In response, general counsel for the State Personnel Department sent a letter to Jenkins, informing her that the time period for a review by the State Personnel Board had

expired. (Pl's Ex. 4) In addition, Jenkins was advised as follows:

> The information submitted in your petition regarding the possible hiring of individuals into Ms. Jenkins' classification, is concerning as such would violate State Personnel Board rules and regulations. Based upon Ms. Jenkins' position, we checked our records to determine if anyone had been hired through an open-competitive register as a Department Program Manager. Our records indicate no such appointment since March of 2003. Likewise, we checked provisional appointments and determined that the Secretary of State's office does not have *any* provisional employees. If you can provide the names of individuals whom Ms. Jenkins believes were appointed to a DPM position or who is serving in a provisional status, we will be happy to investigate further.
>
> The State Personnel board does not have the authority to force the Secretary of State's office to hire any employee, regardless of the budget situation.

(*Id.*) In October 2005, Jenkins filed this lawsuit in the Montgomery County Circuit Court. (Doc. No. 1) The defendants removed the case to this court on October 31, 2005. (*Id.*)

IV. DISCUSSION

A. The Due Process Claims against Worley

The court concludes that Jenkins has abandoned her claims that Worley violated her due process rights during the lay-off process and two-year waiting period. In the defendants' motion for summary judgment, Worley argues that Jenkins' claims in Counts I, II and III that she violated the Fourteenth Amendment are without merit. (Doc. No. 37.) In her response Jenkins does not list as an enumerated claim or brief any issues against Worley concerning a violation of the Due Process Clause. In fact, there are no specific references to the Fourteenth Amendment or the Due Process Clause at any point in her response. Jenkins merely argues that "[t]he conduct of the defendants violated [her] rights under the Merit System Law and the Rules of the State Personnel Board..." (Doc. No. 47-2, p. 19) Jenkins alleges no facts and makes no argument in response to Worley's motion for summary judgment with respect to the due process claims.

The burden is on the parties to formulate arguments, and a plaintiff's failure to list an enumerated claim and brief an issue in a memorandum of law in opposition to a defendant's motion for summary judgment is deemed an abandonment of that claim. See *Iraola & CIA, S.A. V. Kimberly-Clark Corp.*, 325 F. 3d. 1274 (11th Cir. 2003); *Thomas v. Alabama Council on Human Relations, Inc.*, 248 F. Supp. 2d. 1105, 1107 n. 1 9m.D. Ala. 2003). *CF. Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp.* 10 F. 3d. 1563, 1568 (11th Cir. 1994). Consequently, the defendants' motion for summary judgment with

respect to the due process claims against Worley are due to be granted.

B. The Merit System Act Claims[5]

(1) Seniority and Service Ratings

Jenkins contends that Worley violated the Merit System Act when she failed to consider her seniority and service ratings and the rules adopted by the State Personnel Board prior to terminating her from her position as Department Program Manager.

First, the court questions the timeliness of Jenkins' contention that Worley failed to consider her seniority and service ratings and other requirements prior to her termination in violation of the Merit System Act. Section 36-26-27, ALA. CODE 1975, provides, in pertinent part, as follows:

> ...The dismissed employee may, within 10 days after notice, appeal from the action of the appointing authority by filing with the board and the appointing authority and written answer to the charges. The board shall, if demand is made in writing by the dismissed employee within 10 days after notice of discharge, order a public hearing and, if the charges are proved unwarranted, order the

[5] These claims are state law claims. Pursuant to 28 U.S.C. Sec. 1367 (c) (3), the court could decide to exercise jurisdiction over these claims because it has dismissed the federal claims. However, given that this case was filed in 2005 and the parties have fully briefed or had the opportunity to fully brief all the issues, the court concludes that it should exercise jurisdiction and resolve all claims.

reinstatement of the employee under such conditions as the board may determine...

Although Jenkins was discharged on October 31, 2003, she waited until July 2005 to submit a petition for review to the State Personnel board. Thus, Jenkins' claim that Worley failed to comply with the Merit System Act prior to her termination was filed over a year after the time for submitting a claim to the State Personnel Board had expired.

Moreover, even assuming Jenkins' claim was timely filed, the undisputed evidentiary materials indicate that Worley considered the service and seniority ratings of both Departmental Program Managers in her office prior to Jenkins' termination. The Secretary of State's retention calculations indicate that Jenkins received a performance appraisal score of 48.07 and a seniority score of 45, with a combined efficiency rating of 93.07, and that Frith received a performance appraisal score of 50 and a seniority score of 45, with a combined efficiency rating of 95. (Doc. No. 37-4, Graham's Affid., p.5; Attach. C) Thus, Jenkins' score was lower than Frith's score. Consequently, Jenkins' position was selected to be abolished in accordance with the layoff plan and the Merit System Act. This court therefore concludes that the motion for summary judgment with respect to this claim against Worley is due to be granted.

(2) The Merit System Classification

In Claims Two and Three of her complaint, Jenkins asserts that Worley violated the Merit System Act by appointing another employee who was not listed on the State Register into her position and

without first re-offering her the job. Jenkins has failed to point to any evidence indicating that another employee was appointed to her merit-system classification as a Department Program Manager. In addition, there is no evidence that any provisional employee was assigned to this management position. Although Viox begrudgingly assumed more tasks and responsibilities after Jenkins was laid-off, Viox remained in the classification of an Administrative Support Assistant III and was given nothing more than the title of "Acting Director of Corporations" and some business cards as a reward for her additional efforts. Other than Jenkins' own conclusory allegations, Jenkins has presented no evidence to support her contention that Worley assigned another employee to her classification. The court therefore concludes that the motion for summary judgment with respect to these claims against Worley is due to be granted.

C. The Claims against Members of the State Personnel Board

Jenkins asserts that members of the State Personnel Board did not require Worley to abide by the Rules of the State Personnel Board and failed to investigate her allegations in violation of the Merit System Act and the Fourteenth Amendment.[6] In her petition for review to the State Personnel Board,

[6] The court notes that Jenkins attempted to amend her Complaint to add a claim that the State Personnel Board failed to conduct a fact-finding hearing. (Doc. No. 28) However, this court denied her motion to amend as untimely. (Doc. No. 35) Consequently, Jenkins' contention that the defendants failed to conduct a hearing in violation of the Merit System Act or the due Process Clause is not before the court.

Jenkins asserted that another employee was assigned permanently or provisionally to her prior classification in violation of state law.[7]

As previously discussed, the undisputed evidentiary materials indicate that Worley followed the Rules of the state Personnel Board and Merit System Act when deciding to lay off Jenkins from the Secretary of State's Office. Thus, Jenkins' assertion that members of the State Personnel board failed to insure that Worley abided by the rules is without merit. In addition, counsel for the State Personnel Board investigated the aforementioned allegations on behalf of the board and found no evidence that another employee was assigned to Jenkins' prior classification.[8] The court therefore concludes that

[7] In her petition for review, Jenkins also asserted that "[i]f the current budget of the Office of the Secretary of State is equal to or exceeds the budget of the office prior to the budget cuts passed by the Legislature in October 2003, the Secretary of State has violated the Constitution and Statutory Law of the State of Alabama." (Doc. No. 48-4, Pl's Ex. 3, p.2) This asseveration, however, was not raised in Jenkins' federal complaint. (Doc. No. 1) Thus, whether Jenkins should have been reappointed to her position due to a possible increase in the State's budget is not an issue before this court. Moreover, even assuming *arguendo* Jenkins' argument were before the court, there is no state law requiring the "reappoint[ment] of a former employee] to her position where the economic shortfall resulting I her layoff [has] been abated..." (Doc. No. 47-2, p. 18) The protection afforded under Sec. 36-26-26 ALA. CODE to former employees only provides that, "[i]n addition to any rights currently provided to state employees, any permanent state employee who is laid off from a position under the state Merit System shall have priority for any other position in the same class filled from an open competitive register by any appointing authority in accordance with the rules adopted by the State Personnel board.

[8] To the extent Jenkins asserts that the individual members of the board, instead of counsel, should have investigated the

the motion for summary judgment is due to be granted with respect to Jenkins' contention that the State Personnel Board members erred in failing to investigate her claim.

V. CONCLUSION

Accordingly, for the reasons as stated, it is ORDERED that the defendants' motion for summary judgment be and is hereby GRANTED. (Doc. No. 36)

A separate final judgment will be entered.

Done this 8th day of April, 2008.

/s/Charles S. Coody
CHARLES S. COODY
CHIEF UNITED STATEMAGISTRATE JUDGE

claims against Worley, she has failed to demonstrate that she suffered any prejudice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12603-JJ

ROBINA JENKINS,

Plaintiff-Appellant,

Versus

NANCY WORLEY,
individually and in her capacity as
Secretary of State, State of
Alabama,
JOE DICKSON,
HARRY MCMILLAN,
HORACT W. POWELL, SR.,
JOYCE P. O'NEAL,
individually and in their capacity
as members of the State Personnel
Board, et al.,

Defendants-Appellees.

- - - - - - - - - - - - - - - -

On Appeal from the United States District
Court for the Middle District of Alabama

- - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

THE STATE PERSONNEL BOARD FOR THE STATE OF ALABAMA

IN RE THE MATTER OF
ROBINA JENKINS
2418 Elsmeade Drive
Montgomery, Alabama 36116

PETITION FOR REVIEW

Comes now, Robina Jenkins, pursuant to 41-22-1, Code of Alabama 1975, the Administrative Procedure Act and 36-26-1, Code of Alabama 1975, the Merit System Act, and petitions the Alabama State Personnel board to review petitioner's layoff, and in support of the petition shows the Board as follows:

1. On or about October 2003, the Secretary of State (Secretary) Nancy Worley submitted a budget reduction plan to the State Personnel Board which laid off petitioner to comply with budget cuts passed by the Alabama State Legislature.
2. The plan submitted by the Secretary of State was to reduce the Secretary of State's budget approximately $228,700.00.
3. Petitioner had been employed in the Secretary of State's office for approximately 13 years and as a state employee for 17 years.
4. That Petitioner was notified by the Secretary that she would be placed on

the layoff reemployment register for the classification in which she was laid off for two years; that during this time, the appointing authority of this agency could not hire someone in this class from the register or provisionally as long as she was available for reemployment, that no other state agency could hire any employees from an open-competitive register in petitioner's class as long as she is available for the position.

5. That petitioner has reason to believe the Secretary has hired an individual provisionally in the classification in which petitioner was laid off.

6. That petitioner has reason to believe, other State agencies have hired individuals from an open-competitive register in the classification in which petitioner was laid off.

7. That petitioner has reason to believe the current budget of the Office of the Secretary of State is equal to or exceeds the budget of said office prior to the budget cut passed by the Legislature in October, 2003.

8. That the Secretary has hired an individual provisionally in the classification petitioner held prior to her layoff, thereby violating the Constitution and Statutory Law of the State of Alabama, and specifically the budget cuts enacted by Alabama Legislature in 2003.

9. That other state agencies have hired individuals from the open-competitive register in the classification in which petitioner was laid off without first offering the position to petitioner, thereby violating petitioner's rights under the Merit System Act and the Constitution of Alabama and Statutory Laws.

10. If the current budget of the Office of the Secretary of State is equal to or exceeds the budget of the office prior to the budget cuts passed by the Legislature in October, 2003, the Secretary of State has violated the Constitution and Statutory Law of the State of Alabama, and specifically the budget cuts passed by the legislature in October, 2003.

WHEREFORE, the above premises considered, petitioner respectfully requests the State Personnel Board for the following relief:

a) Conduct a prompt fact-finding proceeding;

b) grant petitioner the right to engage in legal discovery;

c) thereafter, set this petition for a hearing;

d) find that the Secretary of State has violated the Constitution of Alabama, the statutory laws of Alabama, the budget cuts passed by the Alabama Legislature in

October 2003, and the Merit System Act;

e) order petitioner reinstated to the classification she held in the Secretary of State's office prior to her layoff;

f) order back pay, pay increases and all benefits petitioner would have been due but for the layoff;

g) such other, further and different relief the Board deems proper.

Respectfully submitted,

James E. Wilson, Jr. WIL077
Attorney for Petitioner

OF COUNSEL:
James E. Wilson, Jr.
732 Carter Hill Road
P. O. Box 6237
Montgomery, Alabama 36106
334-834-9899

Certificate of Service

I hereby certify I have served the forgoing on the following by placing a copy in the United States Mail postage prepaid this 18th day of July, 2005.

Nancy Worley
Secretary of State
First Floor, State Capitol
Suite S-105
P. O. Box 5616
Montgomery, Alabama 36103-5656

IN THE CITCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ROBINA JENKINS,

Plaintiff,

v. **CASE NO.**

NANCY L. WORLEY, individually and in her capacity as SECRETARY OF STATE, State of Alabama; JOE DICKSON, individually and in his official capacity as a member of the State Personnel Board; HARRY MCMILLAN, individually and in his official capacity as a member of the State Personnel Board; JOHN MCMILLAN, individually and in his official capacity as a member of the State Personnel Board; HORACE W. POWELL, individually and in his official capacity as a member of the State Personnel Board; JOYCE P. O'NEAL, individually and in her official capacity as a member of the State Personnel Board,

Defendants.

COMPLAINT

1. Plaintiff, Robina Jenkins is over the age of nineteen (19) years, a citizen of the United States and the State of Alabama, and resides at 2418 Elsmeade Drive, Montgomery, Alabama.

2. Defendant, Nancy L. Worley, is over the age of nineteen (19) years, a citizen of the United States and the State of Alabama. Defendant Worley is, and at all times material hereto was the duly elected Secretary of State for the State of Alabama with a principal office at the State Capitol, 600 Dexter Avenue, Suite S-105, Montgomery, Alabama 36103. Defendant Worley is sued individually and in her official capacity as Secretary of State for the State of Alabama.

3. Defendant Joe Dickson is over the age of nineteen (19) years, a citizen of the United States and the State of Alabama. Defendant Dickson is, and at all times material hereto was a duly appointed member of the State Personnel Board for the State of Alabama. Defendant Dickson is sued individually and in his official capacity as a member of the State Personnel Board for the State of Alabama.

4. Defendant Harry McMillan is over the age of nineteen (19) years, a citizen of the United States and the State of Alabama and resides at 153 Payne Road, Montgomery, Alabama. Defendant Harry McMillan is, and at all

times material hereto was a duly appointed member of the State Personnel board for the State of Alabama. Defendant Harry McMillan is sued individually and in his official capacity as a member of the State Personnel Board for the State of Alabama.

5. Defendant John McMillan is over the age of nineteen (19) years, a citizen of the United States, and the State of Alabama. Defendant John McMillan is, and at all times material hereto was a duly appointed member of the State Personnel Board for the State of Alabama. Defendant John McMillan is sued individually and in his official capacity as a member of the State Personnel Board for the State of Alabama.

7. Defendant Joyce P. O'Neal is over the age of nineteen (19) years, a citizen of the United States and the State of Alabama. Defendant O'Neal is, and at all times material hereto was a duly appointed member of the State Personnel Board for the State of Alabama. Defendant O'Neal is sued individually and in her official capacity as a member of the State Personnel Board of the State of Alabama.

COUNT I
ALLEGATIONS
SECRETARY OF STATE

8. Plaintiff was formerly employed as a Department Program Manager in the Office of the Secretary of State, State of Alabama. Plaintiff had been employed in the Secretary of State's office for thirteen (13) years and with the State of Alabama for seventeen (17) years. Plaintiff was a "classified employee" under 36-26-1, et seq., Code of Alabama, 1975, the Merit System Act.

9. On or about October 16, 2003, Defendant Worley notified plaintiff that due to budget cuts, plaintiff's employment with the Secretary of State would end effective October 31, 2003.

10. Pursuant to, and in accordance with the provisions of the Merit System Act hereinabove referred to, defendant Worley is required to consider plaintiff's seniority and service rating in determining whether to lay off plaintiff.

11. Defendant Worley failed and refused to consider plaintiff's seniority and service rating and retained employees with less seniority and service rating than plaintiff, in violation of the Merit System Act and rules adopted by the State Personnel Board.

12. The failure and refusal of Defendant Worley to consider plaintiff's seniority and service rating, and the rules adopted by the State Personnel Board

in laying off plaintiff, deprived plaintiff of her protected interest in plaintiff's position as Department Program Manager, in violation of the Merit System Act.

13. The failure and refusal of defendant Worley to consider plaintiff's seniority and service rating, and rules adopted by the State Personnel Board in laying off plaintiff, deprived plaintiff of her protected property interest in his position as Department Program Manager, in violation of the Fourteenth Amendment to the United States Constitution.

14. The failure and refusal of Defendant Worley to consider plaintiff's seniority and service rating, and rules adopted by the State Personnel Board in laying off plaintiff was willful, intentional and in bad faith.

WHEREFORE, for the above and foregoing reasons, plaintiff respectfully requests compensatory damages in the sum of $600,000 and punitive damages in the sum of $1,000,000 against defendant Worley.

COUNT II

15. Plaintiff adopts and realleges paragraphs 1-9 as a part of this Count, as if said paragraphs were fully set forth herewith.

16. When Defendant Worley notified plaintiff on October 16, 2003 that her

employment with the Secretary of State would end effective October 31, 2003, she further notified plaintiff, in accordance with the requirements of the Merit System Act that plaintiff would be placed on the layoff re-employment register for two years, for the classification in which she was laid off; and that during that period of time the appointing authority of the agency would not hire anyone in the classification from the register or provisionally as long as plaintiff was available for re-employment.

17. Subsequent to plaintiff's layoff, however, Defendant Worley appointed an individual as acting Director, Corporate Division, which was the classification plaintiff held prior to her layoff.

18. Plaintiff was available for re-employment at the time defendant Worley appointed the individual to the position.

19. Defendant Worley's failure and refusal to offer re-employment to plaintiff in the classification plaintiff held prior to her layoff deprived plaintiff of her protected property interest in the position and violated rights guaranteed plaintiff under 32-26-1, et seq., Code of Alabama, 1975, the Merit System Act.

20. Defendant Worley's failure and refusal to offer re-employment to plaintiff in the classification plaintiff

held prior to her layoff deprived her of her protected property interest in the position in violation of the Fourteenth Amendment to the United States Constitution.

21. The action of Defendant Worley in appointing an individual in the classification plaintiff held prior t her layoff was willful, intentional and in bad faith.

WHEREFORE, the above premises considered, plaintiff requests compensatory damages in the sum of $600,000 and punitive damages in the sum of $1,000,000 against Defendant Worley.

COUNT III

22. Plaintiff adopts and realleges paragraphs 1-9 as a part of this Count, as if said paragraphs were fully set forth herein.

23. Subsequent to plaintiff's layoff, Defendant Worley hired an individual to the position plaintiff held prior to her layoff even though the person was not on the State Employment Register for said position.

24. The action of Defendant Worley in hiring an individual in the position who was not on the State Employment Register, violate the Merit System Act, and deprived plaintiff of her protected property interest in her position.

25. The action of Defendant Worley in hiring an individual in the position who

was not on the State Employment Register for the position deprived plaintiff of her protected property interest in the position in violation of the Fourteenth Amendment to the United States Constitution.

26. The action of Defendant Worley in hiring an individual to the position who was not on the State Employment Register for the position was willful, intentional and in bad faith.

WHEREFORE, the above premises considered, plaintiff requests compensatory damages in the sum of $600,000 and punitive damages in the sum of $1,000,000 against Defendant Worley.

COUNT IV
STATE PERSONNEL BOARD

27. Plaintiff adopts and realleges as a part of this Count paragraphs 1-9, as if said paragraphs were fully set forth herewith.

28. The State Personnel Board has jurisdiction and authority, inter alia, pursuant to and in accordance with the provisions of Code of Alabama, 1975, Title 36-26-6(b) (3) to make investigation either on petition of a citizen, tax payer or interested party, or of its own motion, concerning the enforcement and effect of the Merit System Act, and to require observance of the provisions of the Act and the

rules and regulations made pursuant thereto.

29. On or about July 18, 2005, plaintiff filed a Petition for Review with Defendant State Personnel Board wherein plaintiff alleged, inter alia, that Defendant Worley has hired an individual from an open competitive register or provisionally in the classification in which plaintiff was laid off, in violation of rights plaintiff is guaranteed under the Merit System Act. Plaintiff further requested that Defendant Board conduct a prompt fact-finding proceeding; order plaintiff reinstated to the classification she held in the Secretary of State's office prior to her layoff; and order back pay, pay increases and all benefits plaintiff would have been due but for the illegal layoff.

30. On or about August 15, 2005, plaintiff identified to Defendant Board the individual Defendant Worley hired in the classification plaintiff held prior to plaintiff's layoff.

31. Defendant State Personnel Board has the duty under the Merit System Act to require Defendant Worley to abide by the provisions of said Act, and the rules and regulations made by the board pursuant to said Act.

32. Defendant State Personnel Board breached its duty to require Defendant Worley to abide by the provisions of the Merit System At, thereby depriving

plaintiff of her protected interest in her position.

33. As a further consequence and result of Defendant State Personnel board's breach of its duty, plaintiff was deprived of her protected property interest in her position in violation of the Merit System Act and the Fourteenth Amendment to the United States Constitution.

34. The failure of the Defendant Board, after notice, to require Defendant Worley to abide by the provisions of the Merit System Act and the rules and regulations made by the Board pursuant to said Act, was willful, intentional and in bad faith.

WHEREFORE, plaintiff demands compensatory damages individually and severally against each member of the State Personnel Board named herein in the sum of $600,000, and punitive damages in the sum of $1,000,000.

PLAINTIFF DEMANDS TRIAL BY JURY.

Respectfully submitted,

James E. Wilson, Jr. WIL077
Attorney for Plaintiff

OF COUNSEL:
James E. Wilson, Jr.
732 Carter Hill Road
P. O. Box 6237
Montgomery, Alabama 36106